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No. 96-1447

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Petitioner,

VS.

BE&K CONSTRUCTION COMPANY, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the standard for determining whether the exercise of general *in personam* jurisdiction comports with the requirements of the Due Process Clause as set out in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and as refined in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), requires further refinement?

RULE 29.6 LISTING

(1) BE&K, Inc. (privately held, parent corporation of respondent BE&K Construction Company);

(2) Polar BE&K Latvia, Ltd. (partially owned subsidiary);

(3) Rentinko Oy (partially owned subsidiary); and

(4) Digital Training Sciences Corporation (partially owned subsidiary).

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent BE&K Construction Company ("BE&K") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Supreme Court of Alabama's decision denying a petition for writ of mandamus filed by petitioner.

OPINIONS BELOW

The decision of the Supreme Court of Alabama is reported at 688 So. 2d 246 (1997), and is also attached to the petition as Appendix A. The decision of the Circuit Court of Jefferson

County, Alabama is unreported, but is attached to the petition as Appendix B.

STATEMENT OF THE CASE

Petitioner failed to include in its Statement of the Case all the facts in the record which reveal the extent of petitioner's contacts with Alabama. In its opinion below, the Supreme Court of Alabama set out the facts on which it relied in assessing the constitutionality of the exercise of general *in personam* jurisdiction in this case:

> The [United Brotherhood of Carpenters] does not maintain an office, a bank account, or property in Alabama. It does maintain the membership of 10 local affiliates, whose 2,584 resident members represent only one-half of one percent of the UBC's total membership.
>
> ***
>
> We note that in 1994 the UBC's Alabama membership collectively paid $198,022 in dues and that the UBC paid over $50,000 in funeral benefits to Alabama members. Although the UBC's collection of dues is not for profit, it is systematic and continuous. During the period in question, the UBC maintained Rudolph Clay, a local representative of the general president, who provided the UBC with weekly reports concerning anti-BE&K activities throughout the state. The UBC has consistently directed and/or supported prounion activities at Alabama jobsites, and has conducted rallies, funded radio advertisements, held press conferences, and provided handbills for members to distribute at jobsites that employ nonunion workers. Although Alabama members of the UBC do not constitute a large portion of its overall organization, they

> do maintain a continuous relationship with the UBC in order to systematically further their admitted goal of discouraging contractors who do not provide union labor.

Pet. App. 12a.

In addition to those facts noted by the Supreme Court of Alabama, the record contains additional facts relating to petitioner's contacts with Alabama. Petitioner had employed its local representative of the general president since 1971, and that individual resided and directed petitioner's activities in Alabama. Since 1987, that representative (along with other officials from petitioner's Washington, D.C. office) had spearheaded and appeared at numerous events across Alabama as part of petitioner's nationwide campaign to force BE&K out of business. Furthermore, petitioner has negotiated several labor agreements with Alabama employers and with other employers concerning projects in Alabama.

After the trial court ruled that it had general *in personam* jurisdiction over petitioner, petitioner filed a petition for writ of mandamus in the Supreme Court of Alabama seeking to have that ruling overturned. At the outset of its discussion of that issue in its opinion, the Alabama Supreme Court recognized that the case would be governed by the "minimum contacts" analysis outlined by this Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Pet. App. 8a. The Alabama court also noted that, in the context of general jurisdiction, there is a further requirement that a plaintiff establish that "the defendant's contacts with the forum have been 'continuous and systematic.'" Pet. App. 9a (citing *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984); *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952)). Based on the facts described above, the Alabama Supreme Court concluded that petitioner's contacts with Alabama were sufficiently continuous and system-

atic to warrant exercise of general jurisdiction. That, however, was not the end of the court's analysis. The court then analyzed whether exercise of general jurisdiction over petitioner would be reasonable in light of factors enumerated in *Asahi Metal Industry Co. v. Superior Court of California, Solano County*, 480 U.S. 102 (1987), and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). Pet. App. 13a. After examining those factors, the Supreme Court of Alabama concluded that "traditional notions of fair play and substantial justice would not be violated if the UBC is required to submit to the jurisdiction of an Alabama court." *Ibid.*

REASONS FOR DENYING THE WRIT

I. This case involves the factbound application of the settled due process standard relevant to the exercise of general *in personam* jurisdiction, and there is no conflict of authority among the lower federal courts or state courts concerning this standard.

The standard for determining whether a court's exercise of general *in personam* jurisdiction comports with the requirements of the Due Process Clause is well settled. In *International Shoe*, this Court established the benchmark against which jurisdiction over a defendant not physically present in the forum state be assessed: such a defendant must "have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." 326 U.S. at 316 (internal quotation omitted). Although the Court in *International Shoe* indicated that exercise of jurisdiction over a defendant in a case concerning matters unrelated to the defendant's activities within the forum state could be constitutionally permissible, the standard to be employed in that situation was not refined until later cases. In *Helicopteros*, the Court indicated that the *International Shoe* benchmark would be satisfied in the general jurisdiction context when the defendant

had "continuous and systematic" contacts with the forum state. 466 U.S. at 415-416; *see also Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 448 (1952) (upholding exercise of general jurisdiction where defendant corporation's president had engaged in "continuous and substantial" supervision in the forum state of the defendant's activities).

The state courts and lower federal courts have consistently applied this standard to cases involving issues of general jurisdiction. As noted above, the Supreme Court of Alabama applied the settled standard derived from *International Shoe* and *Helicopteros* to the facts of this case. Pet. App. 8a-12a. In fact, virtually all of the courts in the cases cited by petitioner applied this very standard to the facts before them. *See, e.g., Kuenzle v. HTM Sport-Und Freizeitgerate AG*, 102 F.3d 453, 455 (10th Cir. 1996); *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567-568 (2d Cir.), *cert. denied*, 117 S. Ct. 508 (1996); *Wilson v. Belin*, 20 F.3d 644, 647 (5th Cir.), *cert. denied*, 115 S. Ct. 322 (1994); *Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 853 & n.3 (9th Cir. 1993); *Nichols v. G.D. Searle & Co.*, 991 F.2d 1195, 1199 (4th Cir. 1993); *Madara v. Hall*, 916 F.2d 1510, 1516 & n.7 (11th Cir. 1990); *Michigan Nat'l Bank v. Quality Dinette, Inc.*, 888 F.2d 462, 464-465 (6th Cir. 1989); *Provident Nat'l Bank v. California Fed. Sav. & Loan Ass'n*, 819 F.2d 434, 437 (3d Cir. 1987); *Glover v. Western Airlines, Inc.*, 745 P.2d 1365, 1367 (Alaska 1987); *Vons Cos. v. Seabest Foods, Inc.*, 926 P.2d 1085, 1091-1092 (Calif. 1996), *petition for cert. filed*, 65 U.S.L.W. 3756 (U.S. May 5, 1997) (No. 96-1762); *Thomason v. Chemical Bank*, 661 A.2d 595, 599 (Conn. 1995); *Maunder v. DeHavilland Aircraft of Canada, Ltd.*, 466 N.E.2d 217, 220-221 (Ill.), *cert. denied*, 469 U.S. 1036 (1984); *Goodyear Tire & Rubber Co. v. Ruby*, 540 A.2d 482, 487 (Md. 1988); *Price & Sons v. Second Judicial Dist. Court*, 831 P.2d 600, 601 (Nev. 1992) (discussing only *Helicopteros*); *Ultra Scientific, Inc. v. Yanusas*, 687 A.2d 1247, 1249 (R.I. 1997); *National Indus. Sand*

Ass'n v. Gibson, 897 S.W.2d 769, 772 (Tex. 1995).[1]

Out of this remarkable continuity among the lower federal courts and state courts, petitioner has struggled to find uncertainty and confusion by parsing the facts of each case and then deriving an interpretation of the holding that seems at odds with the approaches of other courts. If one looks to the cited cases, however, it is readily apparent that the differences identified by petitioner are not differences in standards or approaches, but rather reflect the inevitable variety that results when a single standard is applied to a plethora of factual situations. This Court has repeatedly recognized that the standards established to guide the constitutional analysis of jurisdictional issues are somewhat general by necessity and that each case must be assessed on its own facts. In *Kulko v. Superior Court of California*, 436 U.S. 84, 92 (1978), the Court made this point:

> Like any standard that requires a determination of "reasonableness," the "minimum contacts" test of *International Shoe* is not suspectible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite "affiliating circumstances" are present. *Hanson v. Denckla*, 357 U.S. 235, 246 (1958). ***We recognize that this determination is one in which few answers will be written "in black and white. The greys are dominant and even among them the shades are innumerable."*** *Estin v. Estin*, 334 U.S. 541, 545 (1948).

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[1] Petitioner cited a number of cases in its petition that were decided prior to this Court's *Helicopteros* decision. While the probative value of those cases as support for alleged confusion among the lower federal courts and state courts is dubious, those cases consistently rely on the *International Shoe* standard in undertaking the general jurisdiction analysis. *See, e.g., Laufer v. Ostrow*, 434 N.E.2d 692, 694 (N.Y. 1982); *Crose v. Volkswagenwek Aktiengesellschaft*, 558 P.2d 764, 768 (Wash. 1977) (also relying on *Perkins*); *Markby v. St. Anthony Hosp. Sys.*, 647 P.2d 1068, 1071 (Wyo. 1982).

(Emphasis added); *accord International Shoe*, 326 U.S. at 319 (test "cannot simply be mechanical or quantitative"); *Perkins*, 342 U.S. at 445 ("The amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state are to be determined in each case."). Petitioner apparently wants this Court to develop the type of mechanical or quantitative test for the general jurisdiction analysis that the Court has indicated is not possible to create. The Court should reject this request. The lower federal courts and state courts, including the Supreme Court of Alabama in this case, are faithfully applying the standard that the Court has previously developed to the fact-specific situations which they confront, so there is no need for further review by this Court. Just this Term, this Court denied another petition for writ of certiorari raising the same issue related to general jurisdiction, *see Metropolitan Life*, 117 S. Ct. at 508, and there certainly has been no change in the state of the law on that point in the few months since that denial.[2]

The suggestion by petitioner that the lower courts employ four separate approaches to deciding general jurisdiction cases has no basis in the case law. In placing various courts into one of its four groups, petitioner has engaged in an arbitrary reading of the cases which ignores the fact that the various courts are consistently applying the same standard. As an example, petitioner's primary basis for distinguishing between its "Alabama group"

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[2] The decision by the Supreme Court of Alabama in this case merely applied preexisting Alabama case law to the facts of this case, so there has been no change in Alabama law concerning the due process limits of general jurisdiction since the denial of certiorari in *Metropolitan Life*. *See* Pet. App. 11a-12a; *see also* Petition for Cert. at 14-15 & n.4 (describing Alabama case law on general jurisdiction and alleging reliance on that case law by the Supreme Court of Alabama in this case).

and "California group" of courts is an alleged requirement by the latter group that the defendant corporation or unincorporated association conduct "substantial" activities in the forum state in order for the exercise of general jurisdiction to be permissible. The problem with this contention is that a number of cases in the "Alabama group" use the term "substantial" as part of the analysis of the defendant's contacts with the forum state, *see Provident Nat'l Bank*, 819 F.2d at 437-438; *Ex Parte British Steel Corp.*, 426 So. 2d 409, 412 (Ala. 1983); *Administrators of Tulane Educ. Fund v. Cooley*, 462 So. 2d 696, 703 (Miss. 1984), *cert. denied*, 474 U.S. 820 (1985); *Glover*, 745 P.2d at 1368-1369; *Crose*, 558 P.2d at 766; *Hartley v. American Contract Bridge League*, 812 P.2d 109, 112 (Wash. Ct. App.), *review denied*, 820 P.2d 511 (Wash. 1991); whereas at least one of the cases in the "California group" fails to use the term as part of its analysis of the defendant's contacts, *see National Indus. Sand*, 897 S.W.2d 769. The conclusion to be drawn from this is that the talismanic significance that petitioner wishes to attribute to the term "substantial" is inappropriate. None of the "Alabama group" of courts holds, as petitioner suggests, that the nature, volume and extent of an entity's contacts with the forum state are irrelevant, and none of the "California group" suggests that the term "substantial" adds something meaningful to the requirement that contacts be "continuous and systematic."

Petitioner's suggestion that some courts go even further to require that substantiality be determined by looking to the proportion of the defendant's activities in the forum state as against its activities elsewhere is wrong. In each of the cases cited by petitioner in support of this proposition, the court in question looked to the proportion of the defendant entity's activities as one of many factors to be examined as part of the general jurisdiction analysis, but not one of those courts held or even suggested that this particular factor is controlling. *See, e.g., Nichols*, 991 F.2d at 1200; *Hughes v. A.H. Robins Co.*, 490 A.2d

1140, 1143 (D.C. 1985); *Goodyear*, 540 A.2d at 486-487; *Derman v. Wilair Servs., Inc.*, 590 A.2d 317, 324 (Pa. Super.), *appeal denied*, 600 A.2d 537 (Pa. 1991).

Petitioner's most surprising claim is its contention that the Second Circuit in *Metropolitan Life* has developed a "very different inquiry for determining the constitutionality of the exercise of general jurisdiction." Petition for Cert. at 23. In the *Metropolitan Life* opinion, the Second Circuit applied the very two-step approach to the general jurisdiction analysis employed by the Alabama Supreme Court in this case: first, the court must determine if the defendant entity has constitutionally sufficient contacts with the state, and, if so, then the *Asahi* factors must be examined to determine whether the exercise of jurisdiction is reasonable under the particular circumstances of the case. 84 F.3d at 567-568. Not only is this approach identical to the one employed by the Alabama court in this case, but the Second Circuit also indicated that its approach was consistent with that employed by the First, Fourth, Fifth, and Ninth Circuits. *Id.* at 569 & 573.

In sum, the decision by the Supreme Court of Alabama involves the factbound application of a settled constitutional standard. Like the Alabama court, lower federal courts and other state courts have consistently applied this settled standard to the particular factual situations confronted, and there is no conflict of authority which requires resolution by this Court.

II. There is an alternative basis for the Alabama courts to assert jurisdiction over petitioner, which renders pointless the requested review by the this Court.

Even if the Alabama courts could not exercise general jurisdiction over petitioner, the exercise of specific jurisdiction would still be appropriate. In opposing the motion to dismiss filed in the trial court by petitioner alleging the absence of *in*

personam jurisdiction over petitioner, BE&K argued that both general and specific jurisdiction exist in this case. BE&K identified three independent bases for specific jurisdiction: (1) petitioner had targeted its actions at BE&K, an Alabama resident, or, at the very least, should have known that its actions would have detrimental effects on BE&K and the citizens of Alabama, *see, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-473 (1985); (2) petitioner participated in a conspiracy against BE&K and at least one of the conspirators committed an overt act within or aimed at a citizen of Alabama, *see, e.g., Duke v. Young*, 496 So. 2d 37, 40 (Ala. 1986); and (3) petitioner had direct contacts with Alabama related to the claims in this case, *see, e.g., Brooks v. Inlow*, 453 So. 2d 349, 351 (Ala. 1984). Pltf.'s Brief in Opp. to Mot. to Dismiss at 26. Neither the trial court nor the Supreme Court of Alabama reached the question of the existence of specific jurisdiction. Thus, even if this Court were to grant the petition and rule in petitioner's favor on the merits, the exercise would be purely academic due to the existence of the separate basis for jurisdiction. To grant a petition for certiorari in such a circumstance would be a waste of this Court's limited resources.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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